Office - Supreme Court, U.S.
FILED
JUN 2 1982
ALEXANDER L. STEVAS,
CLERK

81-2221

No. ____

IN THE

Supreme Court of the United States

October Term, 1982

JAMES M. RUTLEDGE,
Petitioner,

vs.

SMALL BUSINESS ADMINISTRATION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Edward B. Cloutman, III

MULLINAX, WELLS, BAAB
& CLOUTMAN, P.C.
8204 Elmbrook Drive
Suite 200
Dallas, Texas 75247
(214) 630-3672

Counsel for Petitioner

QUESTIONS PRESENTED

1.

May a United States District Court grant a defendant summary judgment against a *pro se* Plaintiff in a civil rights action raising factual and legal issues of racial discrimination in the awarding of assistance and/or funding to small businesses, particularly where factual issues were explicit and implicit in all contentions of racial discrimination?

2.

Whether a United States District Court may treat the administrative actions of a United States agency as those only requiring substantial evidence review, or must it grant a trial *de novo* on all issues raised by an action alleging racial discrimination in services by a governmental agency?

LIST OF PARTIES

James M. Rutledge.

Small Business Administration.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutory Provisions	2
Statement of the Case	2
Reasons for Granting the Writ	4
Argument	5
Conclusion	7
Appendix	App. 1

TABLE OF AUTHORITIES

	Page
Associated Electric Cooperative, Inc. v. Morton, 507 F.2d 1167 (D.C. Cir. 1974)	6
Choudhry v. Jenkins, 559 F.2d 1085 (7th Cir. 1977)	6
Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975)	6
Liotta v. National Forge Co., 629 F.2d 903 (3rd Cir. 1980), *cert. denied*, ___ U.S. ___ (1981)	7
Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc., 563 F.2d 391 (9th Cir. 1977)	6
Rivera Morales v. Benitez de Rexach, 541 F.2d 882 (1st Cir. 1976)	6
Rosenthal v. Rizzo, 555 F.2r 390 (3rd Cir. 1977)	6
Smith v. Hudson, 600 F.2d 60 (6th Cir. 1979)	5
Southern Distributing Co., Inc. v. Southdown, Inc., 574 F.2d 824 (5th Cir. 1978)	6
United States v. Diebold, 369 U.S. 654 (1962)	5
United States v. Matheson, 532 F.2d 809 (2nd Cir. 1976)	6
Watkins v. Northwestern Ohio Tractor Pullers Assoc., Inc., 630 F.2d 1155 (6th Cir. 1980)	5

No. ____

IN THE

Supreme Court of the United States

October Term, 1982

JAMES M. RUTLEDGE,

Petitioner,

vs.

SMALL BUSINESS ADMINISTRATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, a small businessman in Dallas, Texas, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 29, 1982;[1] rehearing and rehearing *en banc* denied March 5, 1982[2] and mailed to Petitioner on March 15, 1982.[3]

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unreported. It is reproduced in the appendix hereto (App. p. 11). The opinion of the Dis-

[1]Appendix, p. 11.

[2]Appendix, pp. 12-13.

[3]Appendix pp. 14-15.

trict Court for the Northern District of Texas rendered May 13, 1981, is also unreported and is reproduced in the appendix hereto (App. pp. 3-6, together with other unreported miscellaneous orders of the Court dated May 13, 1981 and May 18, 1981 (App. pp. 7-9).

JURISDICTION

The judgment of the Court of Appeals was rendered on January 29, 1982. Rehearing and rehearing *en banc* were denied on March 5, 1982, but not communicated to Petitioner until March 15, 1982 [see letter of Gilbert F. Ganacheau, Clerk, by H. E. Adams, Jr., Deputy Clerk, dated March 15, 1982 (App. pp. 14-15)]. This Court's jurisdiction is involved pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The Civil Rights Act of 1866, 42 U.S.C. §1981, coupled with 28 U.S.C. §1343(4), was invoked as the basis for Petitioner's action below. There are reproduced in their entirety in the appendix hereto (App. pp. 16-17). Petitioner in the court of appeals has also relied upon 42 U.S.C. §2000d, 15 U.S.C. §§631, 634, 636 and 637, all sections of the Small Business Act (as amended), together with Executive Order No. 11625 relative thereto.

STATEMENT OF THE CASE

Petitioner brought this action originally pursuant to 42 U.S.C. §1981 and 28 U.S.C. §1343(4) in the United States District Court for the North-

ern District of Texas contending that Respondent's denial to him of financial assistance in connection with his business enterprises in Dallas, Texas, was the result of racial discrimination. Petitioner filed his original complaint *pro se* and proceeded in both the trial court and court of appeals without counsel. Petitioner's Amended Complaint was filed February 27, 1981. It is upon this amended complaint that the Court granted summary judgment at the behest of Respondent. Petitioner also filed a pleading entitled, "Plaintiff's Statements of Undisputed Facts" in connection with the Respondent's application for summary judgment. This pleading, as its title suggests, set forth Petitioner's contentions of both the factual and legal nature relative to his complaints against Respondent.

Premised upon Petitioner's filing of his Statement of Undisputed Facts and because Petitioner was a *pro se* litigant, the trial court reconsidered its Order of March 9, 1981 which granted summary judgment in favor of the Respondent and treated the above pleading, together with a Notice of Appeal as a request by Petitioner for a new trial. The district court, on May 13, 1981, entered a memorandum order reaffirming its March 9, 1981 order directing summary judgment and denying Petitioner' request for "new trial" (App. pp. 3-6). The district court reiterated its award of summary judgment to Respondent on May 18, 1981, (App. pp. 7-9) and ordered that Petitioner's earlier notice of appeal be considered timely filed for purposes of the Court's May 13,

1981 award of summary judgment to Respondent.

Plaintiff proceeded on appeals *pro se*. Petitioner's Application for Appointment of Counsel by the United States Court of Appeals for the Fifth Circuit was denied on August 7, 1981, a copy of which was filed with the District Court on August 10, 1981 (App. p. 10). Thereafter, Petitioner filed a brief in support of his claims, again describing the factual issues in need of resolution by the district Court. Petitioner further emphasized the unresolved factual contentions in his reply brief, also filed with the Court of Appeals for the Fifth Circuit. Nonetheless, on January 29, 1982, the Court of Appeals affirmed *per curium* and without opinion the ruling the trial court below (App. p. 11).

Petitioner moved for rehearing and/or for rehearing *en banc*, but same was denied by order of the United States Court of Appeals for the Fifth Circuit on March 5, 1982, a copy of which was transmitted to the Petitioner by cover letter dated March 15, 1982 (App. pp. 14-15).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with decisions of other circuits as noted *infra* and presents questions of major importance relative to summary disposition of civil rights claims.

ARGUMENT

Petitioner submits that the district court, as well as the court of appeals, erred as a matter of law in the awarding of summary judgment based upon the allegations of his Amended Complaint, his Statement of Undisputed Issues and the case law controlling the award of summary judgment pursuant to Rule 56, Federal Rules of Civil procedure.

Since this Court's decision in *United States v. Diebold*, 369 U.S. 654, 655 (1962), the clear rule has been that summary judgment shall not be granted unless no material fact is in dispute and inferences from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Circuit courts have interpreted *Diebold* in various and sundry fashions, but all stand for the proposition that (1) a trial court may not make findings regarding disputed facts, premised upon a motion for summary judgment, and (2) that the burden of demonstrating that no genuine issue of material facts exists rests with the movant. The movant's papers are to be closely scruitinized while those of the Petitioner (in this case) should have been viewed indulgently. *Smith v. Hudson*, 600 F.2d 60, 63-64 (6th Cir. 1979), cert. dismissed 444 U.S. 986 (1979). See also *Watkins v. Northwestern Ohio Tractor Pullers Assoc., Inc.*, 630 F.2d 1155, 1158 (6th Cir. 1980). Further, it seems clear that in addition to resolving all doubts against the movant for summary judgment, the district court should

not assess the probative value of any evidence nor resolve factual issues without the benefit of the truth seeking procedures or trial. See *Southern Distributing Co., Inc. v. Southdown, Inc.*, 574 F.2d 824, 826 (5th Cir. 1978). And, *Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc.*, 563 F.2d 391, 393 (9th Cir. 1977).[4]

Notwithstanding the controlling authority, the district court in its March 9, 1981 and May 13, 1981 award of summary judgment to respondent resolved the ultimate fact issue in dispute of whether Respondent treated Petitioner's application for financial assistance differently because of race, and whether it had treated other black applicants for financial assistance in a similarly disparate fashion.

The district court analyzed Petitioner's Statement of Undisputed Facts, but nowhere resolves Plaintiff's contention that race became a factor in his treatment through the processing of his application for financial assistance. Petitioner notes several inconsistent actions by Respondent in the processing of his application, which of course are denied by Respondent. An indulgent consideration of Petitioner's statement of his contentions would lead one to a reasonable conclusion that racial bias was asserted to exist as an integral part of the

---

[4]Other circuits follow the above-stated principals. See, e.g., *Chaudhry v. Jenkins*, 559 F.2d 1085, 1088-1091 (7th Cir. 1977); *Rosenthal v. Rizzo*, 555 F.2d 390, 392-393 (3rd Cir. 1977); *Rivera Morales v. Benitez de Rexach*, 541 F.2d 882, 884-885 (1st Cir. 1976); *United States v. Matheson*, 532 F.2d 809, 813 (2nd Cir. 1976); *Jaulr v. Wilson*, 521 F.2d 724, 729 (8th Cir. 1975); and *Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167, 1178 (D.C. Cir. 1974).

decision making process regarding Petitioner's application. This ultimate fact resolution was surely proper for trial on the merits; it was wholly improper for resolution by summary judgment.

Because of the allegations of racial discrimination by Petitioner *pro se* this matter was particularly in appropriate for disposition by summary judgment. The existence of racial bias is often concealed and proven by indirect evidence alone. The concept is frequently subjective in nature. Ultimately, whether racial discrimination crept into the decision making process is a factual resolution, not fitting for decision by summary judgment. See: *Liotta v. National Forge Co.*, 629 F.2d 903 (3rd Cir. 1980), *cert. denied*, ... U.S. ..... [1981].

CONCLUSION

This Court has repeatedly indicated its sensitivity to racial discrimination issues, particularly those presented by *pro se* litigants. The summary judgment disposition of Petitioner's complaint should not be coutenanced and for this reason the writ should be granted.

Respectfully submitted,

MULLINAX, WELLS, BAAB
& CLOUTMAN, P.C.
8204 Elmbrook Drive
Suite 200
Dallas, Texas 75247
(214) 630-3672

By .....
Edward B. Cloutman, III
Counsel for Petitioner

Date: May ....., 1982